83-650

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LEE MEYERSON,

Petitioner,

v.

THE STATE OF ARIZONA, ARIZONA BOARD OF REGENTS, RALPH M. BILBY, RUDY E. CAMPBELL, ESTHER N. CAPIN, EARL H. CARROLL, THOMAS CHANDLER, WILLIAM G. PAYNE, WILLIAM P. REILLY, TIO A. TACHIAS, RENEE MARLER, JOHN SCHWADA, PAIGE E. MULHOLLAN, KARL H. DANNENFELDT, JOYCE FOSTER, GUIDO WEIGAND, AUSTIN JONES, LEONARD D. GOODSTEIN, PETER KILLEEN, JOHN DOES I THRU V, and JANE DOES I THRU V,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

I. A. Whether An Otherwise Qualified Handicapped Person Has Standing To Maintain An Employment Discrimination Action Under 29 U.S.C. § 794 Even If A Primary Purpose Of The Federal Financial Assistance Received By The Discriminating Entity Is Not Employment.

1. Whether this Court should consolidate its decision on this petition with its consideration of the LeStrange v. Consolidated Rail Corp. case scheduled for hearing in the October, 1983, term.

2. Assuming that standing under 29 U.S.C. § 794 requires a showing that a primary purpose of the federal assistance is to provide employment, whether an otherwise qualified handicapped college professor may bring a private action for employment discrimination where the federal assistance in question was grants used to support professors in research projects.

B. Whether An Otherwise Qualified Handicapped Professor Teaching At A University Which Receives Millions Of Dollars Annually In Federal Financial Assistance Has Standing Under 29 U.S.C. § 794 To Maintain An Employment Discrimination Action Without Respect To Which Particular Administrative Segments Of The University Make Use Of The Assistance.

II. Whether A Private Right of Action Exists Under 29 U.S.C § 793.

III. Whether A Handicapped Person Has a Private Right Of Action Under 29 U.S.C. § 793 Pursuant To 42 U.S.C. § 1983

LIST OF PARTIES

The following are all of the parties named in the action: Professor Lee Meyerson (Petitioner) and The State of Arizona, Arizona Board of Regents, Ralph M. Bilby, Rudy E. Campbell, Esther N. Capin, Earl H. Carroll, Thomas Chandler, William G. Payne, William P. Reilly, Tio A. Tachias, Renee Marler, John Schwada, Paige E. Mulhollan, Karl H. Dannenfeldt, Joyce Foster, Guido Weigand, Austin Jones, Leonard D. Goodstein, Peter Killeen, John Does I thru V, and Jane Does I thru V (Respondents).

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DECISIONS BELOW

The decisions of the district court for the district of Arizona are reported at 507 F. Supp. 859 (D.C. Ariz. 1981) and 526 F. Supp. 129 (D.C. Ariz. 1981). The decision of the Ninth Circuit is reported at 709 F.2d 1235 (9th Cir. 1983). All three decisions are captioned *Meyerson v. State of Arizona.*

JURISDICTION OF THE SUPREME COURT

The opinion of the Ninth Circuit was filed on May 9, 1983; the Ninth Circuit's decision on petitioner's motion for rehearing was filed on July 22, 1983. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

TEXT OF STATUTES RELIED UPON

I. 29 U.S.C. § 793 (§ 503 of the Rehabilitation Act of 1973) in pertinent part provides:

Employment under Federal contracts

Amount of contracts or subcontracts; provision for employment and advancement of qualified handicapped individuals; regulations

(a) Any contract in excess of $2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals as defined in section 706(7) of this title. The provisions of this section shall apply to any subcontract in excess of $2,500 entered into by a prime contractor in carrying out any contract for the procurement of personal property and nonpersonal services (including construction) for the United States.

Administrative enforcement; complaints; investigations; departmental action

(b) If any handicapped individual believes any contractor has failed or refuses to comply with the provisions of his contract with the United States, relating to employment of handicapped individuals, such individual may file a complaint with the Department of Labor. The Department shall promptly

investigate such complaint and shall take such action thereon as the facts and circumstances warrant, consistent with the terms of such contract and the laws and regulations applicable thereto.[1]

II. 29 U.S.C. § 794 (§ 504 of the Rehabilitation Act of 1973) in pertinent part provides:

Nondiscrimination under federal grants and programs; promulgation of rules and regulations

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

III. 42 U.S.C. § 1983 in pertinent part provides:

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

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[1] Subsection c, which is not pertinent to this case, deals with waiver of § 793 requirements in instances of special national interest by the President.

STATEMENT OF THE CASE

I. Material Facts

A. *Handicap*

Petitioner is essentially deaf and depends upon lipreading skills for oral communications. Also, he walks with a limp because of a hip ailment which is the result of a childhood disease. (Complaint, clerk's docket #1; excerpt of record p. 3.)

B. *Qualification*

Petitioner is a full professor in Arizona State University's Department of Psychology, College of Liberal Arts. (Complaint, clerk's docket #1; excerpt of record p. 1.) Petitioner's qualifications have not been challenged by respondents. (Respondents raised no question of petitioner's qualifications in any pleading below: see their motion, clerk's docket #8, excerpt of record pp. 27-33; reply, clerk's docket #15, excerpt of record pp. 115-127; response, clerk's docket #26, excerpt of record pp. 153-165; reply, clerk's docket #29, pp. 175-186; answer, clerk's docket #30, pp. 190-193.)

C. *Discrimination*

The Department of Labor found that respondent Arizona State University (ASU) discriminated against petitioner. (See the discussion in section D, below.) These discriminations have been multi-fold, including deprivation of adequate work facilities, unfair salary practices, and denial of opportunities for advancement. (Response, clerk's docket #14, Exh. A attached thereto; excerpt of record pp. 8-11.) For the purposes of this petition, it is sufficient to say that petitioner has been discriminatorily excluded from participation in and denied the benefits of research grants funded by federal assistance. (Response, clerk's docket #23 and Affidavit attached thereto; excerpt of record pp. 149 and 151.) The other discriminations become relevant on remand for trial.

D. *Exhaustion of Administrative Remedies*

The Department of Labor found that ASU "has systematically deprived Professor Meyerson of the opportunity to contribute and earn and has therefore violated its obligations under the affirmative action provisions." (Complaint, clerk's docket #1, Exh. B attached thereto; excerpt of record p. 15.) Although petitioner made every reasonable effort to obtain satisfaction through administrative remedies before filing his suit, he has been thwarted every time and found administrative remedies ineffective despite a finding of discrimination by the Department of Labor. Respondents chose neither to deny nor remedy the discriminations. Rather, they chose to dispute the Department of Labor's powers to enforce the law through the same jurisdictional attacks raised by them in the courts below. Thus, respondents are not being forced to address, much less remedy, the discrimination. In view of the fact that respondents have refused to recognize the Department's decision, and in view of the Department's limited powers and resources for enforcement, petitioner is without an effective remedy for this wrong. (Response, clerk's docket #14 and Affidavit attached thereto; excerpt of record pp. 41-42 and 68.)

E. *Federal Funding of ASU*

Petitioner demonstrated to the district court and circuit court the vast amounts of federal financial assistance, including research grants, received annually by ASU, portions of which were used by the Department of Psychology and psychology professors for research grants. (Motion, clerk's docket #23; excerpt of record pp. 143-145.) For example, petitioner showed that the amount of federal assistance received by ASU has not been less than $5,000,000 annually since 1970 and exceeded $15,000,000 for each of the 1978-1979 and 1979-1980 school years. (Motion, clerk's docket #23; excerpt of record p. 143.) Also, petitioner pointed out that the De-

partment of Psychology received research grants totaling at least $830,400 between 1976 and 1980. (Motion, clerk's docket #23; excerpt of record p. 144.)

II. Procedural History

Petitioner brought an action against respondents charging that he had been discriminated against on the basis of handicap. (Complaint, clerk's docket #1; excerpt of record pp. 1-7.) His complaint was brought under the following federal statutes: 29 U.S.C. § 793, 29 U.S.C. § 794, 31 U.S.C. § 1242, and 42 U.S.C. § 1983.

Respondents filed a motion for summary judgment. (Motion, clerk's docket #8; excerpt of record pp. 27-33.) The district court for the district of Arizona granted the summary judgment with respect to the 29 U.S.C. § 793 claim, dismissed without prejudice the 31 U.S.C. § 1242 claim, and denied summary judgment without prejudice on the 29 U.S.C. § 794 and 42 U.S.C. § 1983 claims. (507 F. Supp. 859; Appendix pp. 13a-23a.)

Thereafter, Petitioner conducted some discovery relating to receipt of federal financial assistance by ASU. (Notice, clerk's docket #11, 12, and 13.) He then filed a motion for reconsideration of the district court's ruling with respect to 42 U.S.C. § 1983 and for partial summary judgment on the threshold issues of 29 U.S.C. § 794.[2] (Motion, clerk's docket #23; excerpt of record pp. 138-150.) Respondents filed a cross-motion for summary judgment. (Response and cross-motion, clerk's docket #26; excerpt of record pp. 153-165.) The district court granted respondents' cross-motion for summary judgment. (526 F. Supp. 129; Appendix pp. 24a-27a.)

On appeal, the Ninth Circuit affirmed.[3] (709 F.2d 1235; Appendix pp. 1a-12a.)

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[2] Petitioner elected not to pursue further his claim under 31 U.S.C. § 1242.

[3] The Ninth Circuit mistakenly assumed that petitioner abandoned his claim of a private right of action pursuant to 29 U.S.C.

JURISDICTION OF THE COURTS BELOW

I. District Court

The district court had jurisdiction over this matter because the action was brought under the following federal statutes: 29 U.S.C. § 793, 29 U.S.C. § 794, 31 U.S.C. § 1242, and 42 U.S.C. § 1983.

II. Ninth Circuit

The Ninth Circuit had jurisdiction over the appeal pursuant to 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit Decision That Petitioner Has No Standing Under § 504 Of The Rehabilitation Act Is In Conflict With Decisions Of Other Circuit Courts On The Same Question And, In Addition, Poses Important Questions Of Federal Law Which Should Be Settled By This Court.

A. *There Is An Irreconcilable Split Between The Circuit Courts On The Question Of Whether There Is A Requirement Under § 504 That A "Primary Objective" Of The Federal Assistance Be Employment.*

This petition should be granted to resolve an irreconcilable split among the circuit courts on the interpretation of § 504, 29 U.S.C. § 794. The Ninth Circuit rejected petitioner's claim under § 504 of the Rehabilitation Act on the basis that private action under that section cannot be maintained unless a primary objective of the federal financial assistance is to provide employment. The Ninth Circuit relied upon its recent opinion *Scanlon v. Atascadero State Hospital*, 677 F.2d 1271 (9th Cir. 1982), *cert. pending*. *Scanlon* was based on *Tra-*

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§ 794 on the basis of 42 U.S.C. § 1983. For the purposes of this petition, that mistaken assumption need not be challenged because respondents did not question whether a private right of action exists under 29 U.S.C. § 794 in the proceedings before the Ninth Circuit.

geser v. Libbie Rehab. Center, Inc., 590 F.2d 87 (4th Cir. 1978), *cert. denied*, 442 U.S. 947.[4] The decisions of the Ninth and Fourth Circuits, however, are in direct conflict with those of the Third and Eleventh Circuits.

The Third Circuit has ruled that § 504 prohibits discrimination against the handicapped in employment by federal grantees without respect to the primary objectives of the financial assistance. *LeStrange v. Consolidated Rail Corp.*, 687 F.2d 767 (3rd Cir. 1982), *cert. granted*, 103 S. Ct. 1765.[5] In reaching that result, the Third Circuit relied heavily on this Court's decision in a Title IX case, *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982), where language very similar to that of § 504 was construed.

The Eleventh Circuit has also held that a plaintiff in an action brought under § 504 need not establish that the employer received federal aid for the primary purpose of providing employment in order to have standing. Instead, the Eleventh Circuit held that a plaintiff need show only that the employer received federal financial assistance and that the plaintiff was an intended beneficiary of the assistance. *Jones v. Metropolitan Atlanta Rapid Transit Authority*, 681 F.2d 1376 (11th Cir. 1982), *cert. pending*.[6]

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[4] Other circuits have followed *Trageser*: United States v. Cabrini Medical Ctr., 639 F.2d 908 (2d Cir. 1981); Carmi v. Metropolitan St. Louis Sewer Dist., 620 F.2d 672 (8th Cir. 1980), *cert. denied*, 449 U.S. 892.

[5] *LeStrange* has been accepted by this Court for review and is scheduled for hearing in October, 1983. Petitioner has filed a motion requesting that this Court consider his case with the *LeStrange* case.

[6] A number of circuit courts have addressed standing under § 794 without including in their discussion any requirement of the "primary objective test." See, for example, Brown v. Sibley, 650 F.2d 760 (5th Cir. 1981); Dopico v. Goldschmidt, 687 F.2d 644 (2nd Cir. 1982); Puskin v. Regents of University of Colorado, 658 F.2d 1372 (10th Cir. 1981); Doe v. New York University, 666 F.2d 761 (2nd Cir. 1981).

The difference between the results reached by the circuit courts cannot be explained on the peculiarities of the individual cases. As shown below, the courts have looked at the same factors and reached opposite conclusions of law.

In *Trageser*, the Fourth Circuit examined the language of § 505(a)(2) of the 1978 Rehabilitation Act Amendments in reaching its decision to limit employment coverage under § 504. Section 505(a)(2), 29 U.S.C. § 794a, provides as follows:

> The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 . . . shall be available to any person aggrieved by an act or failure to act by any recipient of Federal assistance. . . .[7]

The Fourth Circuit concluded that the above-quoted language incorporated into § 505(a)(2) the provisions of § 604 of Title VI, 42 U.S.C. § 2000d-3, which states:

> Nothing contained in this subchapter shall be construed to authorize action under this subchapter *by any department or agency* with respect to any employment practice of any employer . . . *except where a primary objective of the Federal financial assistance is to provide employment.*[8]

590 F.2d at 89. The *Trageser* court thereby imposed § 604's limitation on actions by federal departments and agencies on individuals. A result of this interpretation has been to severely limit the effectiveness of § 504's prohibition against discrimination.

The *LeStrange* and *Jones* opinions (as well as the dissenting opinion of Circuit Judge Ferguson in *Scanlon*)

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[7] § 505(a)(2) is set forth in its entirety in the Appendix at p. 30a.

[8] § 604 is set forth in its entirety in the Appendix at p. 30a. Emphasis in the quotation above has been supplied by petitioner.

disapprove the "reasoning" of the Fourth Circuit in *Trageser* and conclude that Congress intended that federal money should not be used to support those who engage in employment discrimination. In *LeStrange* the Third Circuit rather passionately commented:

> Under the holding of the district court, Conrail is prohibited from discriminating against handicapped passengers, but is free to discriminate against the handicapped in employment. Such an analysis of § 504, unless supported by the words of the relevant statutes or their legislative history, is absurd.
>
> Thus far, the handicapped have not been extended the broad protections against discrimination extended women and members of other minority groups. Federal law protects the handicapped only if employed by the federal government, or federal contractors or grantees. To eliminate protection against discrimination in employment by federal grantees would eliminate a substantial portion of the small amount of protection afforded the handicapped. What is a commonsensicle approach to Title VI, thus, becomes a devastating blow within the context of the Rehabilitation Act. 'In the context of § 504 of the Rehabilitation Act, applied *Trageser*-style, § 604 operates as a blunder buss.' *Scanlon, supra* at 1277 (Ferguson, J., dissenting). *See also, Carmi, supra* at 679 (McMillian, J., concurring). Neither the words of the statutes, nor legislative histories, dictate such a result.

687 F.2d at 776.

Similarly, the Eleventh Circuit in *Jones* rejected the imposition of the limits of § 604:

> Thus Section 505 was intended to encompass only those remedies, procedures and rights of Title VI found in the HEW regulations. Since the HEW regulations did not utilize or mention the restrictions found in Section 604 of Title VI, Congress obviously did not intend Section 505 to incorporate such a restriction into the Rehabilitation Act.

Jones, 681 F.2d at 1382. *See also LeStrange*, 687 F.2d at 774-76.

Petitioner believes it may be of interest to this Court that the United States government, through the Solicitor General, has taken a position on this issue in petitioner's favor. *See* the amicus brief of the government filed in the *LeStrange* case, p. 2 thereof. Likewise, Senators Cranston, Dole, Hatch, Kennedy, Pell, Stafford, and Weicker, and Representatives Biaggi, Edwards, Ford, Jeffords, Miller, Murphy, and Williams have filed an amici brief in *LeStrange* which argues in petitioner's favor on this issue. Further, at least 26 federal agencies have interpreted § 504 as prohibiting discrimination by recipients of federal assistance even if none of the primary purposes of the funding is to provide employment.[9]

Thus, there is an irreconcilable conflict between the circuit courts on the issue whether, in order to pursue a private cause of action under § 504, there must be a showing that the primary objective of federal financial assistance was to provide employment. For the fore-

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[9] 5 C.F.R. 900.706 (OPM); 7 C.F.R. 15b.11-15b.-15 (DOA); 10 C.F.R. 4.122-4.125 (NRC); 10 C.F.R. 1040.66-1040.69 (DOE); 13 C.F.R. 113.3(c) (SBA); 14 C.F.R. 1251.200-1251.203 (NASA); 15 C.F.R. 8b.11-8b.15 (Dept. of Commerce); 18 C.F.R. 1307.5 (TVA); 22 C.F.R. 142.11-142.14 (Dept. of State); 22 C.F.R. 217.11-217.14 (AID); 48 Fed. Reg. 20652-20653 (1983) (to be codified at 24 C.F.R. 8.10-8.13) (HUD); 28 C.F.R. 42.510-42.513 (DOJ); 29 C.F.R. 32.12-32.17 (DOL); 31 C.F.R. 51.55 (Dept. of Treasury); 32 C.F.R. 56.8(b) (DOD); 34 C.F.R. 104.11-104.14 (Dept. of Ed.); 38 C.F.R. 18.411-18.414 (VA); 41 C.F.R. 101-8.305 to 101-8.308 (GSA); 43 C.F.R. 17.210-17.213 (DOI); 45 C.F.R. 84.11-84.14 (HHS); 45 C.F.R. 605.11-605.14 (NSF); 45 C.F.R. 1151.31-1151.34 (NEA); 45 C.F.R. 1170.21-1170.24 (NEH); 45 C.F.R. 1232.9-1232.12 (ACTION); 45 C.F.R. 1624.6 (Legal Services Corp.); 49 C.F.R. 27.31-27.37 (DOT). See the amicus brief of the United States in *LeStrange*, p. 2 thereof.

going reasons, this petition for a writ of certiorari should be granted in order to resolve the conflict between the circuits.

1. *This Court may wish to hold this petition in abeyance until this Court reaches its decision on the merits of the LeStrange case and, thereafter, dispose of argument I.A. of this petition in summary fashion in accordance with LeStrange.*

As pointed out above, this Court has accepted *LeStrange* for review. It may be appropriate, then, for this Court to postpone its decision on argument I.A. of this petition until a decision on the merits of *LeStrange* is reached. Thereafter, this Court may, in accordance with Rule 23.1, dispose of argument I.A. of this petition in summary fashion in accordance with the result in *LeStrange*.

There is a crucial reason for this Court to consider postponing its decision on this petition until deciding the *LeStrange* case. If this Court were to deny this petition and subsequently decide the *LeStrange* case in a way favorable to petitioner's position herein, petitioner's rights would be foreclosed even though this case arose after *LeStrange*. The paradox of such a result is apparent.

2. *This Court may resolve petitioner's claim in argument I.A. of this petition by ruling that a primary purpose of federal research grants is to provide employment.*

Petitioner argued to the Ninth Circuit that, even if the "primary purpose test" were a required element of standing under § 504, he meets the test because a "primary purpose" of the research grants from which he has been excluded is to provide employment.

There is a difference of opinion on this subject among federal courts. One district court has held as a matter of law that

> [A] primary objective of the federal funding received by Rice University was to provide employment to faculty members, specifically faculty members doing research in the Physics Department. A government grant to promote scientific research includes as a primary objective the employment of scientists who will dedicate their time, learning, and skill to an approved research effort.

Guertin v. Hackerman, 25 EPD ¶ 31,604, at 19,503 (S.D. Texas, 1981).

The Ninth Circuit, however, affirmed the district court which had relied on *Sabol v. Bd. of Ed. of Tp. of Willingboro Cty.*, 510 F.Supp. 892 (D.C. N.J. 1981), in holding that research grants are not primarily intended to provide employment. The *Sabol* case is factually distinguishable from this case because there the federal assistance was given directly to handicapped students under the Education for All Handicapped Children Act, 20 U.S.C. § 1405. The plaintiff in *Sabol* did not dispute the fact that the purpose of those funds was to educate children in special education classes. Here, as in *Guertin*, the money comes to and is dispensed by ASU and is used to support professors in research activities. Thus, petitioner respectfully submits that the district court placed mistaken reliance on the *Sabol* case, and that this influenced the Ninth Circuit's decision.

Petitioner wishes to bring to this Court's attention the fact that the pivotal language of § 604 is "*a* primary purpose." The term is not *the* primary purpose. Thus, it is possible to have more than one primary objective for the federal assistance. While the Ninth Circuit recognized the possibility that more than one primary purpose might exist, it concluded that employment was but an insignificant aspect of research grants. It is this conclusion that creates the direct conflict between the district court for the southern district of Texas and the Ninth Circuit.

Thus, there is a question of federal law which should be settled by this Court. If this Court finds that research grants have as a primary purpose the providing of employment, then it need not reach argument I.A., above, because petitioner will show himself to have been excluded from the benefit of funds, a primary purpose of which was to provide employment.

B. *This Court Should Resolve The Split Among The Circuit Courts On The Issue Of The Definition Of "Program or Activity" In 29 U.S.C. § 794.*

In addition to the split among the circuit courts on the "primary objective test" issue, there is also a split among the circuit courts on the definition of "program or activity" as used in § 504. Petitioner acknowledges that the Ninth Circuit expressly declined to address this issue. (See 709 F.2d at 1237, fn.1; Appendix p. 5a) Petitioner wishes to bring this matter to this Court's attention, however, because this Court will be addressing this same issue in its decisions on two cases, both of which petitioner understands are scheduled for review this term. *LeStrange* and *Grove City College v. Bell*, 687 F.2d 684 (3rd Cir. 1982), *cert. granted*, 103 S. Ct. 1181 (construing 20 U.S.C. § 1681, Title IX). Both are Third Circuit decisions which stand for the proposition that if any portion of an educational institution receives federal moneys, then the entire institution is bound by federal nondiscrimination laws. Both cases have directly raised for this Court's consideration the question of the definition of "program or activity."

One circuit court holding a contrary view is the Eleventh Circuit. *Doyle v. University of Alabama in Birmingham*, 680 F.2d 1323 (11th Cir. 1982). That opinion states that the mere fact that a university receives federal financial assistance is insufficient to subject the entire university to the requirements of § 504. This view interprets § 504 as "program-specific." (The first district court opinion in this case, 507 F. Supp. 859, beginning at

page 13a of the Appendix, takes the same view as the *Doyle* opinion.) The Fifth Circuit has reached the same result as the *Doyle* case in *Brown v. Sibley*, above.

Thus, there is an express disagreement among circuit courts as to the definition of "program or activity" which should be resolved by this Court. Petitioner agrees with the interpretation of the term "program or activity" provided by the *LeStrange* and *Grove City* cases, meaning that no part of ASU, a recipient of federal assistance, should be permitted to discriminate against any employees. The view taken by the *Brown* and *Doyle* cases permits wholesale discrimination except as to the specific individuals whom the federal funds reach directly. Petitioner has urged to the courts below, however, that no matter how narrowly drawn the definition of "program or activity" is, he fits within the definition because he can show he was discriminatorily excluded from participation in the "program" of federal research grants. Petitioner respectfully submits that, as to this issue, his case be remanded for proceedings in accordance with this Court's decisions in *LeStrange* and *Grove City*.

II. The Ninth Circuit's Decision That There Is No Private Cause Of Action Under § 503 Of The Rehabilitation Act Raises An Important Question Of Federal Law That Should Be Settled By This Court.

The Ninth Circuit ruled that § 503, 29 U.S.C. § 793, does not give rise to a private right of action. The Ninth Circuit reasoned that a private remedy was inconsistent with the scheme of § 503, which appointed the Department of Labor to enforce the act. The Ninth Circuit relied upon its recent decision in *Fisher v. City of Tucson*, 663 F.2d 861 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 178.[10] In *Fisher*, the court relied on the case *Rogers v.*

[10] In *Fisher* the Department of Labor specifically found that Fisher had not been discriminated against. In this case, the Department of Labor made a finding that ASU has discriminated

Frito-Lay, Inc., 611 F.2d 1074 (5th Cir. 1980), *cert. denied*, 449 U.S. 889.[11]

The Ninth Circuit's opinion in this case as well as in *Fisher* is in conflict with decisions of many district courts. *See*, for example, *Drennon v. Philadelphia General Hospital*, 428 F. Supp. 809 (E.D. Pa., 1977); *Duran v. City of Tampa*, 430 F. Supp. 75 (M.D. Fla., 1977); *Hart v. County of Alameda*, 485 F. Supp. 66 (N.D. Cal., 1979); *Chaplin v. Consol. Edison Co. of N.Y., Inc.*, 482 F. Supp. 1165 (S.D. N.Y., 1980); *Clarke v. FELEC Services, Inc.*, 489 F. Supp. 165 (D.C. Alaska, 1980); *Davis v. United Airlines*, 25 F.E.P. Cases 565 (E.D. N.Y., 1980); *California Paralyzed Veterans Ass'n v. F.C.C.*, 496 F. Supp. 125 (C.D. Cal., 1980); and *Davis v. Modine Mfg. Co.*, 526 F. Supp. 943 (D.C. Kan., 1981).[12]

Petitioner realizes that decisions by circuit courts have superseded many of the above-listed district court opin-

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against petitioner, yet the Department of Labor has been unable to redress the wrongs it found to have been inflicted on petitioner. The importance of the issue whether petitioner has a private cause of action under § 503 is well demonstrated in this case, where a finding against respondents nevertheless leaves petitioner with no remedy.

[11] The *Rogers* result has been reached by a number of circuit courts, for example: Simpson v. Reynolds Metals Co., Inc., 629 F.2d 1226 (7th Cir. 1980); Hoopes v. Equifax, Inc., 611 F.2d 134 (6th Cir. 1979); Beam v. Sun Shipbuilding & Dry Dock Co., 679 F.2d 1077 (3rd Cir. 1982). Petitioner has found no circuit court opinion holding that § 503 does provide a private right of action.

[12] The *Davis v. Modine* case out of the district of Kansas overrules an earlier decision out of that district which found no private right of action. Brown v. American Home Products Corp., 520 F. Supp. 1120 (D.C. Kan., 1981). Further, the *Davis v. Modine* case contains a detailed discussion of the factors considered by the various courts which have ruled on this issue. Therefore, the holding in *Davis v. Modine* is a strong statement in favor of finding a private right and is similar to the dissents of Circuit Judges Goldberg and Fletcher in *Rogers* and *Fisher*, respectively.

ions. Petitioner believes, however, that the large number of district courts which have found a private right of action under § 503 indicates that this is a complicated issue of significant national interest and is, therefore, worthy of this Court's attention. Further, the *Davis v. Modine* case out of the district of Kansas still stands as law in the Tenth Circuit since the Tenth Circuit has not, to petitioner's knowledge, ruled on the question.

The circuit courts' decisions finding no private right of action and the district courts' decisions finding that a private right exists were all reached after elaborate analysis of the same factors. The primary tool used by these courts is the "Cort analysis." [13] *See* for example, *Drennon*, *Hart*, *Chaplin*, *Davis v. United Airlines*, *California Paralyzed Veterans*, and *Davis v. Modine*. In addition, the courts have looked to the 1978 amendments to the Rehabilitation Act. The amendments added § 505, the attorneys fees provision. The district courts view the inclusion of a provision for attorneys' fees as an indication that Congress intended handicapped persons to have a private right of action under § 503. *See*, for example, *Hart*, *Clarke*, and *Davis v. Modine*.

As an additional factor, some courts looked to the subsequent legislative history of § 503, finding therein clear

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[13] In Cort v. Ash, 422 U.S. 66 (1975), this Court stated:

> In determining whether a private remedy is implicit in a statute not expressly providing one, several factors are relevant. First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted' . . . ? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

422 U.S. at 78; (citations omitted; emphasis in original).

expressions of Congressional intent that a private right of action exists. *See*, for example, *Clarke*, *Hart*, and *Davis v. Modine.*[14]

The *Chaplin* court looked at one more factor, the position of the Department of Labor and Office of Federal Contracts Compliance Program. In *Chaplin* the Department of Labor and Office of Federal Contracts Compliance Program filed an amicus brief wherein they urged the finding of a private right of action since "the specter of litigation would have a sobering effect on the parties involved." 482 F. Supp. at 1172. Petitioner's case is a perfect example of what the Department of Labor and Office of Federal Contracts Compliance Program feared: there is a finding of discrimination by the Department of Labor, and, yet, ASU refuses to acknowledge responsibility since there are no "teeth" in the agency's powers of enforcement. At best the agency could suspend federal assistance; it is unlikely, however, that such a punishment would be imposed on a major learning institution such as ASU. Further, as Circuit Judge Goldberg pointed out in his dissent in *Rogers*, there have been other instances where the federal agency finds itself impotent to remedy handicap discriminations. 611 F.2d at 1087-88.

In contrast, all the foregoing factors were considered by the court which rendered the *Rogers* decision, yet an opposite result was reached. Other circuit court decisions reaching the same result as *Rogers* evaluate most of the same factors. The difference between the conflicting decisions, petitioner respectfully suggests, can be attributed only to the predispositions of the judges in applying those analysis tools to § 503. Further, the large number of

[14] Some courts have rejected as improper reliance on post-enactment legislative history for construction of legislative acts. As this Court has recognized, however, certain events subsequent to the enactment of a law may be considered in its interpretation. *North Haven*, 441 U.S. at 687, n.7, where this Court discussed the value of the post-enactment history of § 504.

these cases indicates the high degree of public interest in this question. Thus, there is an important question of federal law which this Court should resolve.

III. The Ninth Circuit's Decision That Petitioner May Not Assert His § 503 Rights Under 42 U.S.C. § 1983 Raises An Important Question Of Federal Law That Should Be Settled By This Court.

The Ninth Circuit's opinion in this case recognized that 42 U.S.C. § 1983 provides a private cause of action for a violation of federal statute under color of state law and that the scope of the section had been broadly interpreted. *Maine v. Thiboutot*, 448 U.S. 1 (1980). The Ninth Circuit noted, however, that this Court has identified two exceptions to the application of § 1983 to statutory violations: (1) where Congress has foreclosed private enforcement of that statute in the enactment itself and (2) where the statute does not create enforceable rights. *Middlesex Cty. Sewerage Auth. v. Sea Clamers*, 453 U.S. 1 (1981); *Pennhurst State School v. Halderman*, 451 U.S. 1 (1981). The Ninth Circuit found that that first exception applied to this case, relying on its own dicta in *Fisher*, that "Congress intended to leave the supervision of the affirmative action programs to the [Department of Labor]." 663 F.2d at 867. Petitioner respectfully suggests that the Ninth Circuit has interpreted *Middlesex* and *Pennhurst* in a manner which renders *Thiboutot* virtually meaningless.

As noted above, the Department of Labor found that ASU discriminated against petitioner, yet the Department's enforcement mechanisms have proved unavailing.[15]

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[15] Petitioner anticipates that respondents will point out the following portion of the Ninth Circuit's decision:

> In addition, we have difficulty accepting Meyerson's conclusion that the enforcement scheme is ineffective. A variety of techniques to seek compliance with the Act may be employed, including informal persuasion. These techniques have been

The Ninth Circuit nevertheless determined that a private right of action under § 503 would be inconsistent with Congressional intent.

Circuit Judge Goldberg, in his dissent in *Rogers*, argued that a private remedy would complement the administrative enforcement scheme. In support of his position, he cited the Department of Labor's position that § 503 does imply a private right of action, and that the prospect of litigation would have the effect of promoting, rather than hindering the Department's enforcement efforts. 611 F.2d at 1103-1104. His views were adopted by Circuit Judge Fletcher, who dissented in the *Fisher* opinion. Further, as Circuit Judge Fletcher pointed out in his dissent, dual enforcement schemes are common. 663 F.2d 870.

Despite the Department of Labor's position on the issue, the majorities in *Rogers* and in *Fisher* stated that the provision of an express administrative remedy creates at least some basis to conclude that a private right of action would be inconsistent with the purposes of the legislative scheme. As pointed out above, the Ninth Circuit accepted this view.

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somewhat effective in Meyerson's own case, as evidenced by the changes that he admits have taken place since he pursued his remedies. Because much of the Department's effort took place subsequent to the district court action and thus is not part of the record before us, we are unable to determine the extent to which the enforcement mechanism has been effective.

Meyerson, 709 at 1240, Appendix p. 11a. In addition to the fact that this comment attempts to justify the court's result by matters outside the record, there is the additional problem that the record is unclear as to whether the minimal improvements "admitted" by petitioner followed commencement of this litigation and, thus, may not be the result of any efforts by the Department of Labor. Further, the record before the Ninth Circuit did not demonstrate whether the "improvements" have been permanent or temporary. Petitioner believes that no informal persuasion will be effective where there is no "specter of litigation" for failure to act.

The effect of the Ninth Circuit's decision in this case is to permit the denial of a right of action under § 1983 whenever Congress has failed by omission to provide for a private right of action. This, petitioner submits is an overly broad use of the *Middlesex* and *Pennhurst* limits on *Maine v. Thiboutot*. Rather, the proper limit would be where Congress has affirmatively stated that there shall be no private right of action.

Thus, an important question of federal law is presented and should be resolved by this Court.

CONCLUSION

Petitioner respectfully requests that this Court accept this petition for certiorari to consider the following issues: (1) whether 29 U.S.C. § 794 covers employees only where the primary purpose of the federal assistance was to provide employment, (2) alternatively, whether a primary purpose of federal grants for research by university professors is to provide employment, (3) whether 29 U.S.C. § 794 is "program-specific", (4) whether there exists a private right of action under 29 U.S.C. § 793, and (5) whether violations of rights given by 29 U.S.C. § 793 can be remedied by an action brought under 42 U.S.C. § 1983.

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 81-5996

LEE MEYERSON,
Plaintiff-Appellant,

v.

THE STATE OF ARIZONA; ARIZONA BOARD OF REGENTS; RALPH M. BILBY; RUDY E. CAMPBELL; ESTHER N. CAPIN; EARL H. CARROLL; THOMAS CHANDLER; WILLIAM G. PAYNE; WILLIAM P. REILLY; TIO A. TACHIAS; RENEE MARLER; JOHN SCHWADA; PAIGE E. MULHOLLAN; KARL H. DANNENFELDT; JOYCE FOSTER; GUIDO WEIGAND; AUSTIN JONES; LEONARD D. GOODSTEIN; PETER KILLEEN; JOHN DOES I THRU V; and JANE DOES I THRU V,

Defendants-Appellees.

Argued and Submitted Dec. 14, 1982

Decided May 9, 1983

Thomas E. Littler, Charles D. Roush, Treon, Warnicke & Roush, Phoenix, Ariz., for plaintiff-appellant.

Stephen K. Smith, Phoenix, Ariz., for defendants-appellees.

Appeal from the United States District Court
for the District of Arizona

Before WALLACE and FERGUSON, Circuit Judges, and GRANT,* District Judge.

WALLACE, Circuit Judge:

Meyerson, a handicapped psychology professor at Arizona State University (the University), charged the University with discrimination under four different statutory provisions: (1) section 504 of the Rehabilitation Act of 1973, as amended (the Act), 29 U.S.C. § 794, (2) section 503 of the Act, 29 U.S.C. § 793, (3) 42 U.S.C. § 1983, and (4) the Revenue Sharing Act, 31 U.S.C. §§ 1242, 1244(a). The district judge granted the University's motion for summary judgment on each statutory claim. *Meyerson v. Arizona*, 507 F.Supp. 859 (D.Ariz. 1981); *Meyerson v. Arizona*, 526 F.Supp. 129 (D.Ariz. 1981). Meyerson appeals the entry of summary judgment only on his claims under section 503, section 504, and section 1983. We affirm.

I

Meyerson is a professor of psychology whose hearing is impaired to the extent that he must depend upon lip reading skills. He also suffers from a hip ailment, the result of a childhood disease. The University does not contest Meyerson's handicapped status and admits that it was aware of his condition when he was hired in 1967. Meyerson charges that the University has discriminated against him in four ways: by preventing him from advancing and fostering his fields of study, by failing to provide him with sufficient resources for research and study, by impairing his opportunities for professional development, and by paying him a salary which is not commensurate with his experience or service.

After pursuing administrative remedies through the University, Meyerson filed a section 503 complaint with the United States Department of Labor (the Depart-

* Honorable Robert A. Grant, United States District Judge, Northern District of Indiana, sitting by designation.

ment). The Department found that the University had discriminated against Meyerson, and has apparently sought to alleviate some of the conditions at the University. Although the parties dispute the effect of the Department's activities, Meyerson admits that "the situation at ASU with regard to discrimination has improved" since he pursued his legal remedies.

Meyerson filed a complaint in district court asserting claims under sections 503 and 504 of the Act, section 1983, and section 1242 of the Revenue Sharing Act. The University moved for summary judgment on all four claims. The district court granted the University's motion on the section 503 claim and dismissed without prejudice Meyerson's claim under the Revenue Sharing Act for failure to exhaust administrative remedies. 507 F.Supp. at 860-62, 864. The district judge also denied without prejudice the University's motion on the section 504 claim because of an inadequate record. *Id.* at 862-63. He also denied the University's motion on the section 1983 claim, pending the resolution of the section 504 issue. The district judge additionally held that Meyerson could not assert a section 1983 claim based on section 503. *Id.* at 864.

After discovery, the parties filed cross-motions for summary judgment. The district judge granted the University's motion on the section 504 and section 1983 claims. 526 F.Supp. at 129. On appeal, Meyerson has abandoned his claim under the Revenue Sharing Act and his section 1983 claim based on section 504. He appeals from the summary judgment entered on his sections 503 and 504 claims, and on his section 1983 claim based on section 503.

II

Section 504 of the Act prohibits discrimination against the handicapped. It states in part that:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of

> this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . .

29 U.S.C. § 794. In a case decided after Meyerson filed this appeal, we stated that a private action under section 504 "cannot be maintained unless a primary objective of the federal financial assistance is to provide employment." *Scanlon v. Atascadero State Hospital*, 677 F.2d 1271, 1272 (9th Cir. 1982) (*Scanlon*). *Accord United States v. Cabrini Medical Center*, 639 F.2d 908 (2d Cir. 1981); *Carmi v. Metropolitan St. Louis Sewer District*, 620 F.2d 672, 674-75 (8th Cir.), *cert. denied*, 449 U.S. 892, 101 S.Ct. 249, 66 L.Ed.2d 117 (1980); *Trageser v. Libbie Rehabilitation Center, Inc.*, 590 F.2d 87, 89 (4th Cir. 1978), *cert. denied*, 442 U.S. 947, 99 S.Ct. 2895, 61 L.Ed.2d 318 (1979); *contra Jones v. Metropolitan Atlanta Rapid Transit Authority*, 681 F.2d 1376, 1378-80 (11th Cir. 1982). The district court held that Meyerson failed to clear this initial hurdle.

Meyerson first requests that we reconsider our holding in *Scanlon*, contending that our analysis there conflicts with the Supreme Court's recent decision in *North Haven Board of Education v. Bell*, 456 U.S. 512, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982) (*North Haven*) (holding that employment discrimination comes within Title IX's prohibition). *See Le Strange v. Consolidated Rail Corp.*, 687 F.2d 767, 777-78 (3d Cir. 1982) (Adams, J. & Weis, J., concurring) (rejecting the "primary objective" requirement as inconsistent with the Court's analysis in *North Haven*), *cert. granted*, —— U.S. ——, 103 S.Ct. 1181, 75 L.Ed.2d 429 (1983) (No. 82-862). *North Haven*, however, was issued one week prior to our filing of *Scanlon* and over four months before the panel's decision to deny the petition for rehearing. Thus, we must ascribe knowledge of *North Haven* to the panel in *Scan-*

lon. North Haven is not directly contrary to *Scanlon*. Since we are not permitted to reverse the decision of a panel of this court, absent a contrary intervening Supreme Court decision or a convening of our court en banc, we must adhere to our holding in *Scanlon*.

Meyerson next claims that even conceding the validity of *Scanlon*, the district court erred in holding that employment was not a primary objective of the federal assistance received by the University. The federal assistance to the University consisted of instructional and research grants. Their primary purpose was to further scientific research and assist in the training of clinical psychologists. Undoubtedly, these programs provided employment for various professors and graduate students. Nevertheless, such a minimal and incidental effect on employment could not have been one of the primary purposes of the grants. Indeed, almost all federal assistance results in an increase of at least some employment. Therefore, to adopt Meyerson's argument would essentially eliminate the "primary objective" requirement, in derogation of the congressional intent. We conclude that providing employment was not one of the primary objectives of the instructional and research grants made by the government to the University.[1]

III

Section 503 of the Act requires affirmative action programs for employing the handicapped. It states that:

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[1] The district court apparently rejected Meyerson's claim both because he failed to establish a sufficient nexus between himself and the federal assistance received by the University, and because he failed to show that a primary objective of the federal assistance was to provide employment. *Meyerson v. Arizona*, 526 F.Supp. 129, 130-31 (D.Ariz. 1981). Since we conclude that Meyerson fails to establish that the research grants had a primary purpose to provide employment, we need not consider the nature of the nexus requirement or whether it was established by Meyerson.

> Any contract in excess of $2,500 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that, in employing persons to carry out such contract[,] the party contracting with the United States shall take affirmative action to employ and advance in employment qualified handicapped individuals as defined in section 706 (7) of this title. . . .

29 U.S.C. § 793(a). Subsequent to the district court's decision in this case, we decided *Fisher v. City of Tucson*, 663 F.2d 861 (9th Cir. 1981), *cert. denied*, —— U.S. ——, 103 S.Ct. 178, 74 L.Ed.2d 146 (1982) (*Fisher*). Employing the four-part test of *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), we concluded that section 503 does not give rise to a private right of action. 663 F.2d at 863-67. Meyerson makes no attempt to distinguish *Fisher*, requesting only that we consider our earlier holding. Again, this argument is one that may be made properly in a suggestion for rehearing en banc, but not to us.

IV

Meyerson contends that although *Fisher* forecloses a private cause of action based directly on section 503, he may still assert a claim under 42 U.S.C. § 1983 based on a violation of section 503.[2] Although we were not con-

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[2] Section 1983 states that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. The Supreme Court has held that section 1983 applies to violations of all federal statutes, not just civil rights

fronted with this question in *Fisher*, our reading of that case and our own independent analysis of the statutory scheme of enforcement under section 503 compel the conclusion that Meyerson cannot circumvent the holding in *Fisher* by asserting his section 503 claim via section 1983.

Section 1983 provides a private cause of action for a violation of a federal statute under color of state law. *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed. 2d 555 (1980). A plaintiff's failure to prove that a private cause of action may be inferred from a statute does not necessarily preclude a remedy under section 1983 based on that statute. *See Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 18-19, 101 S.Ct. 2615, 2625, 69 L.Ed.2d 435 (1981) (*Middlesex*). However, the Supreme Court has identified two exceptions to the application of section 1983 to statutory violations: (1) where Congress has foreclosed private enforcement of that statute in the enactment itself, and (2) where the statute does not create "enforceable rights." *Id.* at 19, 101 S.Ct. at 2626; *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 28, 101 S.Ct. 1531, 1545, 67 L.Ed.2d 694 (1981) (*Pennhurst*). Our task is to determine if either of these exceptions applies to section 503.

The district court rejected Meyerson's section 1983 claim because it concluded that section 503 conferred no substantive rights upon handicapped persons. 507 F. Supp. at 864. Thus, the district court's dismissal fits within the second *Middlesex* exception, the "rights" exception. Meyerson argues that the district court's conclusion cannot be upheld due to our holding in *Fisher*, *supra*. Employing the first prong of the *Cort v. Ash* test, we inquired in *Fisher* whether Congress intended to con-

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statutes. *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980).

fer federal rights on the beneficiaries of section 503. *Fisher*, *supra*, 663 F.2d at 863-64. Answering affirmatively, we concluded:

> While we agree with the Fifth Circuit's ultimate conclusion that section 503 does not create a private right of action, *we do find that the statute creates a federal right on behalf of the protected class.* Clearly the statute was intended to benefit handicapped persons. The statute also provides that any handicapped individual who believes that a contractor is not in compliance with his contract may file a complaint with the DOL, which has investigatory and enforcement powers. It seems apparent that Congress did intend to confer some federal rights on handicapped individuals.

Id. (citation and footnote omitted) (emphasis added).

Meyerson contends that this language precludes the University from asserting the second *Middlesex* exception as a bar to his section 1983 claim. The implication of Meyerson's argument is that a finding for plaintiff under the first prong of the *Cort v. Ash* analysis precludes a defendant's assertion of the second *Middlesex* exception. The University interprets this passage as stating only that a private party has a "right" to seek enforcement through the Department, not that section 503 creates a federal substantive "right" as that term is used by the Supreme Court in *Pennhurst* and *Middlesex*. We need not resolve this question because we conclude that Meyerson's suit is barred under the first *Middlesex* exception, the exclusivity exception.

In applying this first exception, the Supreme Court has stated that, "[w]hen the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under § 1983." *Middlesex*, *supra*, 453 U.S. at 20, 101 S.Ct. at 2626. The Act estab-

lishes the Department as the agency responsible for enforcing its provisions:

> If any handicapped individual believes any contractor has failed or refuses to comply with the provisions of his contract with the United States, relating to employment of handicapped individuals, such individual may file a complaint with the Department of Labor. The Department shall promptly investigate such complaint and shall take such action thereon as the facts and circumstances warrant, consistent with the terms of such contract and the laws and regulations applicable thereto.

29 U.S.C. § 793(b).

The administrative mechanism for enforcing the Act is set out at 41 C.F.R. §§ 60-741.1 through 60-741.54. Under these provisions, any government contract or subcontract for more than $2,500 must contain an affirmative action clause. *Id.* §§ 60-741.4 and 60-741.20. If the Department discovers a violation of the affirmative action clause or of the regulations, it is instructed to proceed "by informal means, including conciliation, and persuasion, whenever possible." *Id.* § 60-741.28(a). If these efforts are unsuccessful, the Department's authorized representative may bring suit to enforce the contractual provisions, withhold progress payments on the contract, terminate a contract in whole or in part, or debar a contractor from receiving future government contracts. *Id.* § 60-741.28(b)-(e). The question before us is whether Congress intended these administrative remedies to be the exclusive remedies under section 503 of the Act.

In *Fisher*, *supra*, under our analysis of the third prong of *Cort v. Ash*, we concluded that a private action under section 503 would be inconsistent with the administrative scheme provided by Congress. We held that "Congress intended to leave the supervision of the affirmative action programs to the [Department]." 663 F.2d at 867. As

indicated earlier, we realize there are differences between the analysis under *Cort v. Ash* of whether a private cause of action can be inferred from a statute and the analysis of whether Congress intended certain remedies to be exclusive.[3] In this case, however, we conclude that the explicit finding in *Fisher* that Congress intended to leave the supervision of the affirmative action programs to the Department disposes of the exclusivity question. We could not now find that Congress did not intend the administrative remedies to be exclusive without directly contradicting *Fisher*.

Moreover, the same reasons which led to our conclusion in *Fisher* are applicable here. We stated there that judicial inquiry would only duplicate the Department's investigation of factual allegations. *Id.* at 867. This observation supports a conclusion that Congress intended the administrative remedies to be exclusive. We indicated in *Fisher* our doubt that Congress intended us to review the affirmative action plans of governmental entities. *Id.* Indeed, statutes mandating affirmative action, as opposed to statutes prohibiting discrimination, lend themselves more easily to administrative enforcement than judicial review. This conclusion is reinforced by Congress's mandate that the Department employ means of persuasion

[3] The most salient difference involves the allocation of the burden of proof. The burden is on the plaintiff to show that Congress intended to create a private cause of action when it enacted a particular statute. *See Osborn v. American Association of Retired Persons*, 660 F.2d 740, 745 (9th Cir. 1981) (silent legislative history and lack of express statutory language are enough to defeat inference of a private cause of action). On the other hand, the burden is not on the plaintiff to demonstrate congressional intent to preserve section 1983 remedies. *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 21 n. 31, 27-28 n. 11, 101 S.Ct. 2615, 2626 n. 31, 2630 n. 11, 69 L.Ed.2d 435 (majority opinion and opinion of Stevens, J., dissenting). Nevertheless, in this case both the express language and the reasoning of *Fisher* preclude us from permitting Meyerson to assert a claim under section 1983, regardless of who shoulders the burden of proof.

and quiet coercion to direct the behavior of statutory offenders. Thus, our independent reading of the statutes and regulations leads us to conclude that Congress intended to foreclose private actions under section 503, whether they are brought directly under section 503 or indirectly under section 1983.

Meyerson contends that Congress could not have intended to foreclose a private action because the available administrative remedies are insufficient. He argues that drastic remedies such as the termination of funds are seldom employed and, hence, are ineffective. He argues further that this insufficiency is illustrated by his own case, in which the Department has found that he was discriminated against by the University, but, he asserts, no significant changes have resulted. It is not our function, however, to "consider whether the current enforcement mechanism is the best method to effectuate the purposes of the Act, our function is to determine the intent of Congress." *Fisher*, *supra*, 663 F.2d at 867. We have concluded that Congress intended these remedies to be exclusive; it is largely irrelevant whether we think that these remedies are efficacious.

In addition, we have difficulty accepting Meyerson's conclusion that the enforcement scheme is ineffective. A variety of techniques to seek compliance with the Act may be employed, including informal persuasion. These techniques have been somewhat effective in Meyerson's own case, as evidenced by the changes that he admits have taken place since he pursued his remedies. Because much of the Department's effort took place subsequent to the district court action and thus is not part of the record before us, we are unable to determine the extent to which the enforcement mechanism has been effective. Furthermore, in an area of intense competition for federal funds, we cannot say that the available remedies are ineffective. The ability of government entities, such as the University, to compete for scarce federal funds might

well be hindered by a record of discriminatory practices toward the handicapped. Thus, although Meyerson may feel unsatisfied by the remedies pursued on his behalf in this case, we cannot say that the administrative enforcement scheme is insufficient to effectuate the policies of the Act.

Therefore, we affirm the district court's dismissal of Meyerson's section 1983 claim although for a different reason than that offered by the district court. We hold that Congress has foreclosed private enforcement of section 503 by providing a comprehensive remedial scheme under the authority of the Department.

AFFIRMED.

FERGUSON, Circuit Judge, concurring:

I concur in Judge Wallace's opinion.

With regard to the issue concerning section 504 of the Rehabilitation Act of 1973, I do so only because *Scanlon v. Atascadero Hospital*, 677 F.2d 1271 (9th Cir. 1982), compels that result. I am still of the opinion that *Scanlon* was incorrectly decided, as I was when I dissented in that case. 677 F.2d at 1272-77.

GRANT, Circuit Judge, also concurs in Circuit Judge FERGUSON's concurring opinion.

UNITED STATES DISTRICT COURT
D. ARIZONA

No. Civ. 80-715 Phx. WPC

LEE MEYERSON,
Plaintiff,

v.

THE STATE OF ARIZONA *et al.*,
Defendants.

Feb. 12, 1981

Charles D. Roush and Gerrie Apker Kurtz, of Treon, Warnicke & Roush, P. A., Phoenix, Ariz., for plaintiff.

Stephen K. Smith, Asst. Atty. Gen. for the State of Arizona, Phoenix, Ariz., for defendants.

MEMORANDUM AND ORDER

COPPLE, District Judge.

Dr. Lee Meyerson, Professor of Psychology at Arizona State University, alleges that he is the victim of discrimination because of his handicap. Dr. Meyerson asserts causes of action under § 503 and § 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 793-794 (Supp. II 1978), the Revenue Sharing Act, 31 U.S.C. 1242 (1976), and 42 U.S.C. § 1983 (1976). The defendants have moved for summary judgment on the following grounds:

(1) there is no private right of action under § 503 of the Rehabilitation Act;

(2) the plaintiff has failed to state a claim under § 504 because he is not the beneficiary of any program or activity that receives federal funds;

(3) the plaintiff has failed to state a claim under the Revenue Sharing Act because ASU does not receive any revenue sharing funds;

(4) the plaintiff fails to state a claim under § 1983 because he has not been deprived of any federal statutory right.

For the purposes of this motion, it is not necessary for this Court to determine whether Dr. Meyerson is an "otherwise qualified handicapped person" within the meaning of the Rehabilitation Act, nor whether he has been the victim of discrimination.

Section 503 Claim

Section 503, 29 U.S.C. § 793 (Supp. II 1978), requires that any contract in excess of $2,500 entered into by any federal department or agency for the procurement of personal property or nonpersonal services "shall contain a provision requiring that, in employing persons to carry out such contract, the [contracting party] shall take affirmative action to employ and advance in employment qualified handicapped individuals . . ."

The past several years has seen considerable litigation over whether this provision confers a private implied right of action upon handicapped persons. No less than three circuit courts have determined that § 503 provides no such right of action. *See Simpson v. Reynolds Metals Co.*, 629 F.2d 1226 (7th Cir. 1980); *Rogers v. Frito Lay, Inc.*, 611 F.2d 1074 (5th Cir.), *cert. denied* —— U.S. —— 101 S.Ct. 246, 66 L.Ed.2d 115 (1980); *Hoopes v. Equifax, Inc.*, 611 F.2d 139 (8th Cir. 1979). This Court is aware that three district courts within the Ninth Circuit have held to the contrary. *California Paralyzed Veterans Ass'n v. F. C .C.*, 496 F.Supp. 125 (C.D. Cal.

1980); *Clarke v. FELEC Services, Inc.*, 489 F.Supp. 165 (D. Alaska 1980); *Hart v. County of Alameda*, 485 F.Supp. 66 (N.D. Cal. 1979). A court within this district has determined that § 503 provides no implied private right of action. *Fisher v. City of Tucson*, CIV. 77-37 TUC (D. Ariz. 1977). This Court has been informed that the Ninth Circuit heard oral argument in *Fisher* in May, 1980, and that a decision by the panel will be forthcoming in the near future.

In view of the exhaustive treatment of this issue by the cases cited above, this Court's discussion will be comparatively brief.

Initially, it must be noted that recent Supreme Court decisions reflect a restrictive approach to implying private rights of action. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 100 S.Ct. 242, 62 L.Ed.2d 146 (1979) [TAMA]; *Touche Ross & Co. v. Redington*, 442 U.S. 560, 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979). *See Jablon v. Dean Witter & Co.*, 614 F.2d 677, 679 (9th Cir. 1980). Whereas the test enunciated in *Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), considered Congressional intent as merely one factor to be balanced against three others, *Touche Ross* and *TAMA* indicate that Congressional intent must be the center of inquiry. *Touche Ross*, 442 U.S. at 575-76, 99 S.Ct. at 2488-89; *TAMA*, 444 U.S. at 23-24, 100 S.Ct. at 248-249. Whether or not Congress intended to create a private right of action is basically a matter of statutory construction. It is not enough that Congress intended to benefit a particular class of people. Rather, the focus is upon whether Congress intended that a statute's obligations be enforced through private litigation. *TAMA*, 444 U.S. at 17-18, 100 S.Ct. at 246-247.

An examination of § 503's language reveals that it is not the type of statute that implicates a private right of action. By its terms, it neither creates or alters civil liabilities, *see TAMA*, 444 U.S. at 18-19, 100 S.Ct. at

246-247, nor does it proscribe certain conduct. *See Touche Ross*, 442 U.S. at 569, 99 S.Ct. at 2485. These cases indicate that a private right of action may be implied if Congress intended to confer substantive rights upon private parties, but failed to provide any federal remedy with which to enforce these rights. *See Cannon v. University of Chicago*, 441 U.S. 677, 699-701, 99 S.Ct. 1946, 1958-1960, 60 L.Ed.2d 560 (1979); *Montgomery v. American Airlines, Inc.*, 637 F.2d 607, 15 Av.Cas. 18,272 (9th Cir. 1980) ("There must be a showing that either the statute proscribes the conduct complained of or that the statute by its terms grants private rights to any identifiable class). The language of § 503 merely requires federal agencies to include an affirmative action covenant in certain procurement and service contracts. *See Simpson*, 629 F.2d at 1239. This point is emphasized when one compares § 503 to the right creating language of § 504. *See Rogers*, 611 F.2d at 1080.

Second, *TAMA* indicates that where a statute expressly provides a particular remedy or remedies, a court should be very reluctant to read others into it. 100 S.Ct. at 247. Section 503(b) permits an aggrieved person to pursue an administrative remedy.[1]

Nevertheless, even settled rules of statutory construction may yield to persuasive evidence of contrary legislative intent. *Securities Investor Protection Corp. v. Barbara*, 421 U.S. 412, 419, 95 S.Ct. 1733, 1738, 44 L.Ed.2d 263 (1975). Even the most vigorous proponents of an implied right of action admit that the legislative history of the Rehabilitation Act of 1973 is virtually silent in this regard. *See, e.g., Rogers v. Frito-Lay, Inc.*, 611 F.2d at 1094 (Goldberg, J., dissenting); *Hart v. County of Alameda*, 485 F.Supp. 66, 73 (N.D.Cal. 1979). What the proponents of a private right of action point

[1] Dr. Meyerson has pursued this administrative remedy, and the Department of Labor has found in his favor.

to, however, are the 1978 Amendments and the accompanying legislative history. In particular, in § 505 Congress added an attorneys fees provision for actions or proceedings brought under the Rehabilitation Act. 29 U.S.C. § 794a(b) (Supp. II 1978).

There is some legislative history of these amendments that Congress in 1978 believed that it had in 1973 created a private right of action under § 503. Nevertheless, the Supreme Court has made it quite clear that such after-the-fact legislative observations are in no sense part of the legislative history of the original statute. *Oscar Meyer & Co. v. Evans*, 441 U.S. 750, 758, 99 S.Ct. 2066, 2072-73, 60 L.Ed.2d 609 (1979). Rather, it is the intent of Congress that passed the statute that controls. *Id.* Although post-enactment treatment of a statute is evidence of the intent of Congress at the time of passage, such expressions may not be accorded the dignity of contemporaneous legislative history as section 503's proponents have done. *See id.* Such expressions are insufficient to overcome the language of the statute itself and the silence of contemporaneous legislative history.

Finally, the attorneys fees provision, § 505, does not explicitly point to § 503, but refers to that section only by implication. In contrast, § 505 provides that the rights, remedies, and procedures of Title VI of the Civil Rights Act of 1964 will be available to an action under § 504, and that certain provisions of Title VII will be available to actions under § 501 (federal employees). 29 U.S.C. § 794a(a) (Supp. II 1978). Whereas Congress in 1978 gave substance to actions under § 501 and § 504, it did not do so with respect to § 503. Of course, § 505 is only evidence that Congress in 1978 may have understood that in 1973 it had created a private right of action only under § 501 and § 504. Nevertheless, this is evidence contrary to legislative expressions in 1978 by individual Congressmen as to what Congress intended in 1973.

Section 504 Claim

Section 504 provides that an otherwise qualified handicapped person may not, "solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to any discrimination under any program or activity receiving federal financial assistance." 29 U.S.C. § 794 (Supp. II 1978). The parties are in dispute as to what constitutes a federally funded program or activity. While the defendants urge this Court to focus upon ASU's Psychology Department, the plaintiff argues that a mere showing that ASU receives federal funding is sufficient.

Section 504 does not generally forbid discrimination against the handicapped by recipients of federal assistance. Instead, the discrimination must have some direct or indirect effect on handicapped persons in the program or activity receiving federal assistance. *Simpson v. Reynolds Metals Co.*, 629 F.2d at 1232. *See Carmi v. Metropolitan St. Louis Sewer Dist.*, 620 F.2d 672, 675 (8th Cir.), *cert. denied*, —— U.S. ——, 101 S.Ct. 249, 66 L.Ed.2d 117 (1980) (the plaintiff must be an intended beneficiary of federal assistance). In *Simpson*, the Seventh Circuit rejected the "unified entity approach" urged by the plaintiffs in that case and seemingly argued by Dr. Meyerson here. Under that theory, "once some part of an entity becomes involved in a program or activity receiving federal financial assistance, the employment practices of the entire institution would be subject to the coverage of § 504." *Id.* at 1233 n.12. Dr. Meyerson's argument that ASU is a federally funded activity or program must be rejected.

This is not to say that summary judgment must be granted. Although the defendants correctly have criticized the entity approach of the plaintiff's, the defendants' focus upon the Psychology Department is subject to the same criticism. The only difference is that the defendants have chosen a smaller entity.

The question is whether Dr. Meyerson benefits directly or indirectly from a federally funded program or activity. *Simpson*, 629 F.2d at 1232. Federally funded activities and programs at ASU must be identified and Dr. Meyerson's relationship to them must be analyzed before this court can determine whether or not the nexus requirement of § 504 has been met. Certainly, it is relevant that Dr. Meyerson may not receive any federal grants and that the Psychology Department may not receive any federal funding. These factors alone cannot be conclusive, however, that Dr. Meyerson is not a direct or indirect beneficiary of a federally funded program or activity. The record is simply incomplete at this point for the defendants to be able to establish the absence of a genuine issue of material fact as to the nexus requirement of § 504.

The second matter in dispute is whether Dr. Meyerson must establish that the primary object of the federal assistance is to provide employment. Section 505 provides that the remedies, procedures, and rights of Title VI are available to an aggrieved person under § 504. 29 U.S.C. § 794a(a)(2) (Supp. II 1978). Section 601 of Title VI contains language almost identical to § 504 of the Rehabilitation Act. Section 604 provides:

> Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer . . . except where a primary objective of the Federal financial assistance is to provide employment.

42 U.S.C. § 2000d-3(1976).

The great weight of authority holds that claims of employment discrimination under § 504 cannot be maintained unless a primary objective of the federally funded activity or program is to provide employment. *See, e.g., Carmi*, 620 F.2d at 674-75; *Trageser v. Libbie Reha-*

bilitation Center, Inc., 590 F.2d 87, 88-89 (4th Cir. 1978), *cert. denied* 442 U.S. 947, 99 S.Ct. 2895, 61 L.Ed.2d 318 (1979); *Simpson*, 629 F.2d at 1233, 1234 & n.13. *Contra, Hart v. County of Alameda*, 485 F.Supp. at 71-73 (§ 604 limitations not applicable to private causes of action under § 504). Under *Trageser*, it is necessary to show either (1) that a primary objective of the federal aid is to provide employment or (2) that discrimination in employment necessarily causes discrimination against the primary beneficiaries of the federal aid. *Guertin v. Hackerman*, 496 F.Supp. 593, 596 (S.D.Tex. 1980).

Due to the inadequate state of the record with respect to these issues at the present time, this Court must deny the defendants' motion for summary judgment without prejudice with respect to the § 504 claim.

Revenue Sharing Act

The parties are in dispute with regard to the requirement of a nexus between revenue sharing funds and the alleged employment discrimination. This issue is resolved by 31 U.S.C. § 1242(a)(2) (1976). That section provides that the antidiscrimination provisions of § 1242(a)(1) do not apply where the governmental entity in question establishes "by clear and convincing evidence, that the program or activity with respect to which the allegation of discrimination has been made is not funded in whole or in part" with revenue sharing funds. *See Harris v. White*, 479 F.Supp. 996, 1010 (D. Mass. 1979). This Court need not determine this issue at the present time, because it is clear that Dr. Meyerson has failed to exhaust his administrative remedies.

Unlike the Rehabilitation Act, the Revenue Act contains an express right of action. 31 U.S.C. § 1244 (1976). The relief available is very limited. *See* 31 U.S.C. § 1244 (b) (order or injunction with regard to suspension, termination, or repayment of revenue sharing funds). Un-

like an action under § 504 of the Rehabilitation Act, the plaintiff must exhaust his administrative remedies before he may institute an action under the Revenue Sharing Act. *Compare* 31 U.S.C. § 1244(a) (1976) *with Kling v. County of Los Angeles*, 633 F.2d 876, 879 (9th Cir. 1980). Section 1244(d) and 31 C.F.R. § 51.64 (1980) provide that an action may not be brought if the complainant has not filed an administrative complaint with the Director of the Office of Revenue Sharing, 31 C.F.R. § 51.61 (1980), or with an agency with which the Director has an agreement under 31 C.F.R. § 51.74 (1980). The pleadings and the record do not indicate whether or not Dr. Meyerson has filed a complaint with the appropriate agency. Thus, the claim under the Revenue Sharing Act must be dismissed without prejudice because it is not clear that Dr. Meyerson has exhausted his administrative remedies.

Section 1983 Claim

The Supreme Court in *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980), recently held that § 1983 provides a remedy for deprivations of rights conferred by federal statutory law as well as the Constitution. Where state action is present, it is unclear just how *Thiboutot* relates to the standards to be employed in determining whether a private right of action should be implied under a federal statute. Dr. Meyerson is probably correct in arguing that it is not necessary first to imply a private right of action under the federal statute in question before one can have a remedy under § 1983. *See Yapalter v. Bates*, 494 F.Supp. 1349, 1355-56 (S.D.N.Y. 1980).

Nevertheless, it is clear that § 1983 is purely a remedial statute—it provides no substantive rights. *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 617-18, 99 S.Ct. 1905, 1915-16, 60 L.Ed.2d 508 (1979). Thus, before one can enjoy a right of action

under § 1983, one must establish a violation of a federally protected right independent of § 1983. In order to have an action under § 1983, it is not enough to establish the violation of a federal statute. Rather, the statute violated must be one that confers a federal right upon the plaintiff. *See, e.g., Maine v. Thiboutot*, 100 S.Ct. at 2504, 2506 n.6 (§ 1983 protects rights, privileges, and immunities secured by federal law); *Cuyler v. Adams*, —— U.S. ——, 101 S.Ct. 703, 712-713, 66 L.Ed.2d 641 (1981) (§ 1983 provides remedy for rights enjoyed by state prisoners under Detainer Agreement); *Kennecott Corp. v. Smith*, 637 F.2d 481 (CCH) Fed.Sec. L.Rep. ¶ 97,731 n.5 (3d Cir. 1980) (§ 1983 protects rights protected by Williams Act); *Holmes v. Finney*, 631 F.2d 150, 154-55 (10th Cir. 1980) (§ 1983 provides remedy to persons deprived of a federal right); *Mrazek v. Suffolk County Bd. of Elections*, 630 F.2d 890, 899 (2d Cir. 1980) (§ 1983 secures persons against deprivation of rights and privileges created under law of United States).

As to § 503, the plaintiff failed to state a cause of action under § 1983 because, as explained above, § 503 confers no substantive rights upon handicapped persons. Whether or not Meyerson is a protected beneficiary under § 504 will determine whether or not § 504 confers upon him any substantive federal rights. As for the Revenue Sharing Act claim, Congress has provided a remedy under 31 U.S.C. § 1244. In *Great American Federal Savings & Loan Ass'n v. Novotny*, 442 U.S 366, 373-78, 99 S.Ct. 2345, 2349-52, 60 L.Ed.2d 957 (1979), the Supreme Court held that the remedial provisions of 42 U.S.C. § 1985(c) cannot be invoked to redress violations of Title VII because the latter contains its own enforcement scheme. *See also Thiboutot v. Maine*, 100 S.Ct. at 2513 n.11 (Powell, J., dissenting). Similarly, the remedial provision of § 1983 cannot be used to circumvent the remedial provisions of the Revenue Sharing Act.

IT IS ORDERED:

1. The defendants' motion for summary judgment is granted as to the plaintiff's claim under § 503 of the Rehabilitation Act.

2. The defendants' motion for summary judgment is denied without prejudice as to plaintiff's claims under § 504 of the Rehabilitation Act and 42 U.S.C. § 1983.

3. The plaintiff's claim under the Revenue Sharing Act is dismissed without prejudice because of the plaintiff's apparent failure to exhaust his administrative remedies.

UNITED STATES DISTRICT COURT
D. ARIZONA

Civ. No. 80-715 Phx. WPC

LEE MEYERSON,

Plaintiff,

v.

THE STATE OF ARIZONA; ARIZONA BOARD OF REGENTS; RALPH M. BILBY; RUDY E. CAMPBELL; ESTHER N. CAPIN; EARL H. CARROLL; THOMAS CHANDLER; WILLIAM G. PAYNE; WILLIAM P. REILLY; TIO A. TACHIAS; RENEE MARLER; JOHN SCHWADA; PAIGE E. MULHOLLAN; KARL H. DANNENFELDT; JOYCE FOSTER; GUIDO WEIGEND; AUSTIN JONES; LEONARD D. GOODSTEIN; PETER KILLEEN; JOHN DOES I THRU V; and JANE DOES I THRU V,

Defendants.

Oct. 28, 1981

Charles D. Roush of Treon, Warnicke, Dann & Roush, Phoenix, Ariz., for plaintiff.

Stephen K. Smith, Phoenix, Ariz., for defendants.

MEMORANDUM AND ORDER

COPPLE, District Judge.

Plaintiff was hired as a psychology professor by Arizona State University in 1962. He is essentially totally deaf and suffers from a hip ailment resulting from a childhood disease. He filed a complaint on September 4, 1980, alleging that defendants had discriminated against him because of his handicap, in a variety of ways.

There are two claims at issue here. First, plaintiff claims that defendants, under color of state authority, deprived him of rights secured by federal law, in violation of 42 U.S.C. § 1983 (1976). Second, he claims that due to his handicap he was subjected to discrimination under a federal program or activity, in violation of § 504 of the Rehabilitation Act, 29 U.S.C. § 794 (Supp. 1976-1980).

This Court previously held that to state a claim under § 1983, plaintiff must show that he has been deprived of a federally protected right, independent of § 1983. *Meyerson v. State of Arizona*, 507 F.Supp. 859, 864 (D.Ariz. 1981). Plaintiff requests that this Court reconsider that decision. In addition, the parties have filed cross motions for summary judgment, regarding plaintiff's claim under § 504 of the Rehabilitation Act.

Initially, this Court reaffirms it's previous decision concerning the § 1983 claim. It is clear that § 1983 is purely a remedial statute; it provides no substantive rights. *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 617-18, 99 S.Ct. 1905, 1915-16, 60 L.Ed.2d 508 (1979). In order to have an action under § 1983 there must be a violation of a separate federal statute, and this statute must confer a federal right. *See, Maine v. Thiboutot*, 448 U.S. 1, 5, 8 n.6, 100 S.Ct. 2502, 2504, 2506 n.6, 65 L.Ed.2d 555 (1980); *Holmes v. Finney*, 631 F.2d 150, 154-55 (10th Cir. 1980). Thus, plaintiff must establish a cause of action under § 504 of the Rehabilitation Act, in order to have an action under § 1983. Consequently, the cross motions for summary judgment under § 504 of the Rehabilitation Act are determinative.

It is well established that summary judgment is only appropriate when there are no genuine issues of material fact, and one party is entitled to judgment as a matter of law. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 467, 82 S.Ct. 486, 488, 7 L.Ed.2d 458 (1967); Fed.R.Civ.P. 56(c).

Section 504 of the Rehabilitation Act provides that an otherwise qualified handicapped individual shall not "solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . ." 29 U.S.C. § 794 (Supp. 1976-1980).

This Court must determine whether the two prerequisites to a § 504 claim have been met, regardless of the merits of plaintiff's claim. The first requirement is that plaintiff must benefit directly or indirectly from a federally funded program or activity. *Simpson v. Reynolds Metals Co.*, 629 F.2d 1226, 1232 (7th Cir. 1980). The discrimination must be "in connection with" a federally funded program or activity. *Id.* Thus, to be actionable, the discrimination must "come in the operation of the program or manifest itself in a handicapped individual's exclusion from the program or a diminution of the benefits he would otherwise receive from the program" *Id.*

Thus, the nature of the federal grants must be ascertained. It appears that the only federal funds received by the psychology department of Arizona State University were instructional and research grants given to the individual professors. Next, it must be determined whether plaintiff has "any connection with" these federal funds. The only link he has with such funds is in connection with his claim that defendants prevented him from obtaining these federal grants. Thus, only under this claim for relief does plaintiff benefit directly or indirectly from a federally funded program or activity. His claims of insufficient space, equipment, responsibility, and authority are completely unrelated to the federal funds.

In any event, even if all the grants were not to the individual professors, the second requirement of a § 504 claim is likewise not met. Claims of discrimination under § 504 cannot be maintained unless a primary objective of the federally funded program is to provide em-

ployment. *Carmi v. Metropolitan St. Louis Sewer District*, 620 F.2d 672, 674-75 (8th Cir. 1980), *cert. denied* 449 U.S. 892, 101 S.Ct. 249, 66 L.Ed.2d 117 (1980); *Trageser v. Libbie Rehabilitation Center, Inc.*, 590 F.2d 87, 88-89 (4th Cir. 1978), *cert. denied* 442 U.S. 947, 99 S.Ct. 2895, 61 L.Ed.2d 318 (1979); *Sabol v. Board of Education of Township of Willingboro*, 510 F.Supp. 892, 894-99 (D.N.J. 1981). *Contra, Hart v. County of Alameda*, 485 F.Supp. 66, 71-73 (N.D.Cal. 1979).

In this instance employment was not a primary objective of the federal funds. The primary objective of the instructional grants was to obtain instruction for students. *See, Sabol, supra* at 895. The primary objective of the research grants was to obtain information. Although the funds happened to result in some employment, this was not one of their primary objectives. If employment was held to be a primary objective of a federal grant, just because the grant results in substantial employment, then almost all federal grants would have employment as a primary objective.

IT IS ORDERED:

1. Plaintiff's motion for reconsideration is denied.

2. Plaintiff's motion for summary judgment is denied.

3. Defendants' motion for summary judgment is granted. The Clerk will enter judgment accordingly denying all relief, pursuant to Rule 58 Fed.R.Civ.P.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Civil Action File No. 80-715 Phx. WPC

LEE MEYERSON,
Plaintiff,

v.

THE STATE OF ARIZONA, *et al.*,
Defendants.

JUDGMENT

This action came on for (hearing) before the Court, Honorable WM. P. COPPLE, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged

1. Plaintiff's motion for reconsideration is denied.
2. Plaintiff's motion for summary judgment is denied.
3. Defendants' motion for summary judgment is granted.

Dated at Phoenix, AZ., this 28th day of October, 1981.

W. J. FURSTENAU
Clerk of Court

By: /s/ F. Daudet
F. DAUDET
Deputy Clerk

cc to:

Stephen K. Smith
Charles D. Roush

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 81-5996

D.C. No. 80-715

LEE MEYERSON,
Plaintiff-Appellant,

—vs—

THE STATE OF ARIZONA;
ARIZONA BOARD OF REGENTS, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the District of Arizona

Before: WALLACE and FERGUSON, Circuit Judges, and GRANT,* District Judge

ORDER

[Filed July 22, 1983]

The panel as constituted above has voted to deny the petition for rehearing; Judges Wallace and Ferguson have voted to reject the suggestion for rehearing en banc, and Judge Grant made no recommendation on the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

* Honorable Robert A. Grant, United States District Judge, Northern District of Indiana, sitting by designation.

29 U.S.C. § 794a Remedies and attorney fees

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000e-16], including the application of sections 706(f) through 706(k) [42 U.S.C.A. § 2000e-5(f) through (k)], shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C.A. 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 2000d-3 Construction of provisions not to authorize administrative action with respect to employment practices except where primary objective of Federal financial assistance is to provide employment

Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.